FILED
JUN 7 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No 119

THOMAS LOCKHART,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA AND BRIEF IN SUPPORT THEREOF.

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Table of Cases Cited.

Barbier v. Connolly, 113 U. S. 27.....9, 20
Bartkus v. United States, 21 F. (2d) 425.....8, 14
Caldwell v. Texas, 137 U. S. 692.....9, 20
Cole v. Arkansas, 333 U. S. 196.....9, 18
DeJonge v. Oregon, 299 U. S. 353.....9, 19
Giozzi v. Tiernan, 148 U. S. 657.....9, 19
International Harvester Co. v. Kentucky, 234 U. S. 16..8, 22
Morrison v. California, 291 U. S. 82.....8, 10, 15-16
Morrow v. United States, 11 F. (2d) 256.....8, 14
Pettibone v. United States, 147 U. S. 197.....8, 13
Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531.... 21
Turinetti v. United States, 2 F. (2d) 15.....8, 10, 14
United States v. Cohen Grocery Co., 255 U. S. 81.....8, 22
United States v. Rabinowich, 238 U. S. 78..... 14
Waters Pierce Oil Co. v. Texas, 212 U. S. 86..... 22
Worthington v. United States, 64 F. (2d) 936.....8, 10, 15
Yick Wo v. Hopkins, 118 U. S. 356.....9, 20

Statutes Cited.

28 U. S. C. 1257 (2).....4, 5, 12
28 U. S. C. 1257 (3).....4, 5, 6, 12
1946 Code of Iowa, Sec. 719.1.....4, 8, 10, 13

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STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

Petitioner, Thomas Lockhart, prays that a Writ of Certiorari issue to review a decision of the Supreme Court of Iowa rendered March 10, 1950, denying a petition for rehearing of a decision and judgment rendered by the said Supreme Court of the State of Iowa under date of November 15, 1949, which said decision and judgment had affirmed a judgment and sentence of the Linn County District Court entered December 10, 1948, sentencing the petitioner to confinement at hard labor in the state penitentiary for an indeterminate period not exceeding three years.

Opinion Below.

No opinion was rendered by the Supreme Court of the State of Iowa on the denial of the petition for rehearing. The opinion of the Supreme Court on the appeal from the Linn County District Court appears in the Record at page 11 and is reported at 39 N. W. 2d 636. It has not yet been officially reported.

Summary Statement of Matter Involved.

On May 14, 1948, a strike was in progress at the plant of Wilson & Co. at Cedar Rapids, Iowa (R. 3, 4). Sometime in the month of September, 1948, there was filed in the office of the clerk of the District Court of Linn County, Iowa, a purported indictment reading as follows (R. 1):

> "To the District Court of said State, within and for said County, at the September Term thereof, in the year of our Lord, one thousand, nine hundred and forty-eight:
>
> "The Grand Jury of the County of Linn, in the name and by the authority of the State of Iowa, accuses Thomas Lockhart, Charles Lockhart, Milton L. Porter, Robert Barta, Leo Pisney and Frank Pernicka of the crime of Conspiracy (Sec. 719.1, 1946 Code of Iowa) committed as follows:
>
> "The said Thomas Lockhart, Charles Lockhart, Milton L. Porter, Robert Barta, Leo Pisney and Frank Pernicka on or about the 14th day of May A. D. 1948, in the county aforesaid, did conspire or confederate together with the malicious intent wrongfully to injure the persons or property of Donald Eckhart, H. S. Clang, Flo Clang and Frank Struve."

Which said instrument was not signed in pen and ink but bore the following typewritten writing, to-wit:

> "Wm. W. Crissman
> County Attorney"

On December 10, the charges as to the defendants Milton L. Porter, Robert Barta, Leo Pisney and Frank Pernicka were dismissed on motion of the state (R. 8), and on January 3, 1949, similar action was taken with respect to the defendant Charles Lockhart (R. 10). On December 10, 1948, the petitioner, the sole remaining defendant in the indictment, pleaded guilty as charged and was sentenced to confinement at hard labor in the state penitentiary for an indeterminate period not exceeding three years. The petitioner excepted (R. 8).

On January 3, 1949, the petitioner filed in the office of the clerk of the District Court of Linn County, Iowa, a notice of appeal (R. 9) and thereafter prosecuted his appeal to the Supreme Court of the State of Iowa. In the said appeal the petitioner pointed out that his guilty plea and the judgment and sentence based thereon were null and void and that the judgment and sentence of the court below were in violation of the Fourteenth Amendment to the Constitution of the United States and denied to the petitioner due process of law and the equal protection of the laws.

In the said appeal petitioner contended that in the nature of the law of conspiracy, both at common law and under the laws of the State of Iowa, it was impossible for the petitioner to have been guilty of conspiring with himself and that the dismissal of the conspiracy charge against all of the remaining defendants required dismissal of the conspiracy charge against petitioner.

Petitioner's claims specifically set up under the Constitution of the United States were presented to the Supreme Court of the State of Iowa in the original appeal and were repeated in the petition for rehearing (R. 14-18).

No question or issue was raised on the appeal or on the petition for rehearing as to the fact that all issues

raised were properly raised and in due time and the State Supreme Court ruled upon the said issues on their merits.

Jurisdiction.

The jurisdiction of this court is invoked under 28 U. S. C. 1257 (2) and (3).

1. The decision sought to be reviewed is a final judgment of the Supreme Court of Iowa, the highest court of that state, affirming a judgment and sentence to imprisonment. In the Supreme Court of Iowa petitioner specifically set up and claimed under the Fourteenth Amendment to the Constitution of the United States his right not to be deprived by the state of his liberty without due process of law by a sentence which condemns him to imprisonment for the commission of an offense of which on the face of the record it was legally impossible for petitioner to have been guilty. The decision below in this regard is therefore reviewable by writ of certiorari under 28 U. S. C. 1257 (3).

2. The petitioner contends that in seeking to imprison him for an offense which it was legally impossible for him alone to have committed, while dismissing the charges against all others accused of having committed the offense together with petitioner, the State of Iowa has denied to petitioner the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. The claim of denial of equal protection was specifically set up before the Supreme Court of the State of Iowa. The decision below in this regard is therefore reviewable by writ of certiorari under 28 U. S. C. 1257 (3).

3. The statute under which petitioner was indicted reads in part as follows:

> "If any two or more persons conspire or confederate together * * *" (1946 Code of Iowa, Sec. 719.1).

If this statute may be construed as it was by the Supreme Court of the State of Iowa to permit the sentencing of petitioner under circumstances in which only the petitioner was found to have been involved in the alleged conspiracy or confederation, then the statute under which the petitioner was sentenced was so vague and indefinite that it did not fairly inform the petitioner of the nature of the offense, thereby violating the due process clause of the Fourteenth Amendment. The decision below in this respect is therefore reviewable by writ of certiorari under 28 U. S. C. 1257 (3).

4. Since, as hereinabove indicated, the statute as construed and applied in this case is open to the objection that it did not fairly inform the petitioner of the nature of the charges against him and since the objection that petitioner was deprived of liberty without due process of law in violation of the Fourteenth Amendment was duly raised by petitioner in the appeal to the State Supreme Court, and in the petition for rehearing before the State Supreme Court, there was thus drawn in question the validity of a state statute, as construed and applied, on the grounds of its being repugnant to the Constitution of the United States, and the decision of the Supreme Court of the State was in favor of the validity of the statute as thus challenged. The decision below is therefore reviewable here by appeal under 28 U. S. C. 1257 (2) or by certiorari under 28 U. S. C. 1257 (3).

5. The indictment upon which the petitioner was sentenced alleged that he and five other named defendants conspired or confederated together with malicious intent wrongfully to injure the persons or property of certain designated individuals. With the dismissal of the charges against the other five defendants leaving petitioner as the only defendant sentenced under the indictment, petitioner was sentenced for an offense substantially dif-

ferent from that alleged in the indictment, and, accordingly, the indictment upon which petitioner came before the court was so vague and indefinite that it did not fairly inform the petitioner of the charge against him in violation of the due process clause of the Fourteenth Amendment. The decision of the court below in this regard is therefore reviewable by writ of certiorari under 28 U. S. C. 1257 (3).

The jurisdiction of the court and the decision supporting such jurisdiction more fully appear from the statement and the reasons for granting the writ.

Questions Presented.

1. Whether petitioner was denied due process of law under the Fourteenth Amendment to the Constitution of the United States by being sentenced to imprisonment for alleged violation of a statute condemning conspiracy by two or more persons when the charges against all the other persons alleged to have participated in such conspiracy with petitioner were dismissed on motion of the state.

2. Whether petitioner was denied due process of law by being sentenced to imprisonment under an indictment charging conspiracy and confederation by petitioner with five named persons when charges under the same indictment against all of the said five other persons were dismissed on motion of the state.

3. Whether petitioner was denied the equal protection of the laws by the action of the state in sentencing petitioner to the penitentiary for conspiracy alleged to have been committed with other named persons while the state dismissed identical charges against all of the said named persons.

4. Whether Section 791.1 of the Code of Iowa as con-

strued and applied to petitioner in the circumstances of the present case is so vague and indefinite that it did not fairly inform petitioner of the charges against him thereby rendering the said statute as so construed and applied invalid under the due process clause of the Constitution.

5. Whether the indictment as upheld in its application to petitioner was so vague and indefinite that it did not fairly inform petitioner of the charges against him in violation of the due process clause of the Fourteenth Amendment of the Constitution.

6. Whether petitioner was actually sentenced and his sentence affirmed for commission of an offense different in substance from that charged in the indictment thereby violating the due process clause of the Fourteenth Amendment.

Reasons for Granting the Writ.

Petitioner was indicted under a statute requiring for its application that two or more persons be involved as participants in the conspiracy. Under this statute petitioner was indicted in an indictment setting forth the names of six specified conspirators including petitioner. There was no allegation in the indictment of any other or additional conspirators, no allegation of any participation in the conspiracy by persons unknown to the grand jury.

All of the six persons named in the indictment were arrested. All of the six persons named in the indictment were alleged to have participated in a plan and conspiracy involving a single event.

Nevertheless the state chose to dismiss the indictment as to all of the alleged conspirators other than petitioner. Petitioner was thus sentenced as the only one of the six alleged conspirators adjudged to have been guilty of the conspiracy set forth in the indictment.

Under these circumstances petitioner is in effect to be sent to the penitentiary as the sole participant in an alleged conspiracy. Such an offense is a legal impossibility. It is a legal impossibility not merely in terms of the common law background and definition of the offense of conspiracy. *Morrison* v. *California*, 291 U. S. 82; *Pettibone* v. *United States*, 147 U. S. 197; *Worthington* v. *United States*, 64 F. (2d) 936; *Bartkus* v. *United States*, 21 F. (2d) 425; *Morrow* v. *United States*, 11 F. (2d) 256; *Turinetti* v. *United States*, 2 F. (2d) 15. It is a legal impossibility in terms of the statutory definition of the offense in the State of Iowa. 1946 Code of Iowa, Sec. 719.1.

If under these circumstances the State of Iowa sends petitioner to the penitentiary, then petitioner will have been imprisoned for violation of no statute appearing on the books of the state. Such a circumstance constitutes a denial of due process to the petitioner.

If on the other hand, the imprisonment of petitioner is sought to be justified under the provisions of the conspiracy statute of the state, then the petitioner is being imprisoned under a construction of the statute involving a very marked departure from what would normally be regarded as the clear meaning of the statute on its face. If a statute describing an offense as one which involves two or more persons can be construed to apply to an alleged conspiracy in which but a single person is involved, then such a statute may fairly be said to be so vague and uncertain as to give to the petitioner inadequate information and understanding as to the nature of the offense charged. *United States* v. *Cohen Grocery Company*, 255 U. S. 81; *International Harvester Co.* v. *Kentucky*, 234 U. S. 16.

By the same token if an indictment specifically alleging a conspiracy by six persons can become the basis for imprisonment of only one of the six and discharge of the

remaining five, then the offense for which the petitioner is imprisoned is so clearly different from the offense charged in the indictment that petitioner is deprived of due process. *Cole* v. *Arkansas*, 333 U. S. 196; *DeJonge* v. *Oregon*, 299 U. S. 353, 362. Under such circumstances, petitioner would be imprisoned for an offense other than that charged in the indictment, or if the offense for which he would thus have been imprisoned is claimed to be described in the indictment, then that indictment is so vague and indefinite as to fail to give the petitioner adequate information as to the nature of the offense charged against him.

If it is contended that the state may exercise its discretion to dismiss the charges against five alleged participants in a conspiracy while sentencing to the penitentiary the sole remaining alleged participant in the conspiracy, then the petitioner has further been a victim of a denial of equal protection of the laws as well as of due process of the law. General and uniform application of the laws and even handed dispensation of justice are one of the basic earmarks of due process of the law as that concept has traditionally developed. *Giozza* v. *Tiernan*, 148 U. S. 657; *Caldwell* v. *Texas*, 137 U. S. 692. Arbitrary discriminations in the application and enforcement of the law carry clear violation of the basic concepts of due process and denial of the equal protection of the law. *Barbier* v. *Connolly*, 113 U. S. 27; *Yick Wo* v. *Hopkins*, 118 U. S. 356. If the state may arbitrarily determine to dismiss five of six designated alleged conspirators and proceed solely against the sixth, then the state will have been permitted to make arbitrary distinctions as to which defendants it will prosecute and which it will fail to prosecute.

These conclusions are particularly applicable where as in the present instance it may fairly be said that if the state lacked sufficient evidence to bring to trial and con-

vict even one of the remaining five alleged conspirators then it automatically was barred from trying and convicting petitioner. It would have been incumbent upon the state at the trial to have convicted at least one other alleged conspirator besides petitioner if the charge of conspiracy were to be sustained against the petitioner. 1946 Code of Iowa, Sec. 719.1; *Morrison* v. *California, supra; Worthington* v. *United States, supra; Turinetti* v. *United States, supra.*

All of these are considerations which raise very basic issues as to the application of criminal statutes and of indictments and as to the necessity for even handed dispensation of justice by the states in the enforcement of their criminal laws. In certain aspects this case poses very broadly significant issues never before directly adjudicated by the court, particularly with reference to the power and right of the state to pick and choose among defendants equally implicated in the alleged commission of crime.

In the brief filed herewith and printed as part of this petition, petitioner sets forth specific decisions and authorities supporting the position of petitioner in this statement of reasons for the granting of the writ.

Because of the novel considerations involved and the broad significance of this case and the violation of certain long-standing and basic principles enunciated by this Court, and because of the severe consequences threatened to the defendant by the denial of due process and equal protection which has been perpetrated, the petition for certiorari should be granted.

Conclusion.

Wherefore, petitioner respectfully prays that a writ of certiorari to the Supreme Court of the State of Iowa be issued out of this court.

Respectfully submitted,

EUGENE COTTON,
Counsel for Petitioner.

EDWARD J. DAHMS,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Supreme Court of Iowa affirming the judgment and sentence of the Linn County District Court appears in the record at page 11 and is reported at 39 N. W. 2d 636. It has not yet been officially reported. No opinion was delivered by the Supreme Court of Iowa on the denial of the petition for rehearing.

Jurisdiction.

The order of the Supreme Court of Iowa denying the petition for rehearing was entered on March 10, 1950. The jurisdiction of this Court rests on 28 U. S. C. 1257 (2) and (3).

Statement of the Case.

A summary statement of the matter involved appears in the petition.

ARGUMENT.

I.

Petitioner Was Denied Due Process of Law by Being Sentenced for an Offense Which Is Not Described in Any Statute of the State and of Which It Is Legally Impossible for Him To Be Guilty.

It is elemental to the concept of due process of law that a defendant be not subjected to loss of liberty for an alleged offense which is not defined as criminal by any law of the state.

The statute governing conspiracy in the State of Iowa, which was the only statute referred to in the indictment, defines the offense as one in which

> "* * * any two or more persons conspire or confederate together * * *" (1946 Code of Iowa, Sec. 719.1).

There can be no doubt that this statute requires the participation of at least two persons in the conspiracy. There is no statute in the State of Iowa penalizing any conceivable "conspiracy" participated in by one person.

The concept of a conspiracy in which there is only one person involved, would, of course, conflict with the basic concept and principle of the doctrine of conspiracy. In this respect the decisions of this Court under the federal conspiracy statutes are typical of the uniform decisions of virtually all jurisdictions:

> "A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means * * *."
>
> *Pettibone* v. *United States*, 148 U. S. 197.

It is this requirement of participation of two or more persons in the combination which distinguishes and separates the offense of conspiracy from the offense which may be the object of the conspiracy.

> "* * * a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. *Collan* v. *Wilson*, 127 U. S. 540, 555; *Clune* v. *United States*, 159 U. S. 590, 595; *Williamson* v. *United States*, 207 U. S. 425, 447; *United States* v. *Stevenson* (*No. 2*), 215 U. S. 200, 203."
>
> *United States* v. *Rabinowich*, 238 U. S. 78.

It is for this reason that in the present case, it is not material whether the petitioner may have been subject to possible indictment and conviction individually for some offense other than conspiracy. What is in issue is whether, having been indicted for an alleged conspiracy, he can be sentenced under circumstances which indicate that he cannot legally be deemed to have been guilty of conspiracy.

In this respect, the statement of the 8th Circuit Court of Appeals in *Turinetti* v. *United States*, 2 F. (2d) 15, is directly apposite. In a case in which three of the five defendants indicted for conspiracy had been acquitted, the Court on appeal found that as to a fourth, the evidence had not been sufficient to warrant submission to the jury. Accordingly the court continued, referring to the fifth defendant, Turinetti:

> "It is obvious that this conclusion renders reversal necessary, also as to Turinetti. Clearly the latter is guilty of some offense or offenses against the National Prohibition Act. * * * Therefore since Turinetti could not have conspired with himself alone, he could not under the law be convicted of a conspiracy * * * the fact of such other violations will not warrant affirmance of this conviction for conspiracy."

See, also:

Morrow v. *United States*, 11 F. (2d) 256.
Bartkus v. *United States*, 21 F. (2d) 425.

The doctrine that one alone of several accused conspirators cannot be guilty of conspiracy has been held applicable even where the indictment charged the participation in the conspiracy, in addition to the named conspirators, of others unknown to the grand jury, but where only one of the named conspirators was convicted and the evidence failed to show the presence in the conspiracy of any other person unknown to the grand jury. *Worthington* v. *United States*, 64 F. (2d) 936.

These doctrines have basic constitutional significance. This Court expressly so held in *Morrison* v. *California*, 291 U. S. 82. That case involved an indictment under state law charging conspiracy, between petitioners Morrison and Doi, to place Doi in possession of land in the State of California despite the fact that Doi was alleged in the indictment to have been an alien ineligible to citizenship. The issue initially before this Court under the due process clause was whether there was a denial of due process under the state law by virtue of a provision which shifted the burden of proof of Doi's citizenship or eligibility to citizenship to the defendants. This issue the Court resolved in one aspect of the case in favor of Morrison. Having thus eliminated one of the two alleged co-conspirators, this Court proceeded to decide the remainder of the case in favor of Doi on the basis of the doctrine that he alone could not have been guilty of conspiracy.

> "Morrison and Doi are charged to have conspired, but Doi alone is charged to be ineligible for citizenship. One might suppose from a reading of the statute that the burden of proof, even if shifted as to him, would be unaffected as to Morrison. The California courts however have cast the burden upon both; and both have been convicted. Nonetheless in applying the presumption, we must keep before us steadily the quality of their crime. It is impossible in the nature of things for a man to conspire with himself. *Turinetti* v. *United States*, 2 F. (2d) 15, 17. In Cali-

> fornia as elsewhere conspiracy imports a corrupt agreement between not less than two with guilty knowledge on the part of each. (Citing cases.)" (291 U. S. at 92.)

In applying these doctrines the Court concluded first that the shift in the burden of proof as to Morrison was a denial of due process.

> "In such circumstances the conviction of Morrison because he failed to assume the burden of disproving a conspiracy was a denial of due process that vitiates the judgment as to him." (291 U. S. at 93.)

Having thus reached this conclusion as to Morrison alone, the Court went on to dispose of the case with respect to Doi directly on the basis of the conspiracy doctrine which it had previously enunciated. Continuing in the same paragraph and directly following the sentence just quoted, the Court went on to say:

> "Nor is that the only consequence. Doi was not a conspirator, however guilty his own state of mind, unless Morrison had shared in the guilty knowledge and design. *Pettibone* v. *United States, supra; Gebardi* v. *United States,* 287 U. S. 112, 123. The joinder was something to be proved, for it was of the essence of the crime. Without it there was a civil wrong, but not a criminal conspiracy, the only crime denounced. *In re Akado, supra.* The conviction failing as to the one defendant must fail as to the other. *Turinetti* v. *United States, supra; Williams* v. *United States,* 282 Fed. 481, 484; *Gebardi* v. *United States, supra.*" (291 U. S. at 93.)

It cannot be too strongly emphasized that the Court was reviewing, on *constitutional* issues, Doi's conviction in a state court. In the language quoted, the reversal as to Doi was squarely rested on the doctrine that one person alone cannot commit a conspiracy.

Thus this case is placed in the following posture:

The statute describes an offense in language which requires the participation of at least two persons.

The uniform decisional background recognizes the offense described by the statute as one which requires the participation of at least two persons.

The state has elected to dismiss the charges as to all those accused of participation except the petitioner. Whatever may have been the reasons of the state for electing to take that action, the fact is that if the state could not convict at least one other person besides the petitioner, it could not convict the petitioner.

The state nevertheless persists in attempting to imprison the petitioner alone for an offense which he alone could not commit.

We respectfully submit that imprisonment for an offense not legally defined as such and which is a factual and legal impossibility cannot possibly be considered imprisonment in accordance with the Constitutional requirement of due process of law.

II.

Petitioner Was Denied Due Process of Law by Being Sentenced for an Offense Substantially Different from the One Charged in the Indictment.

The indictment against petitioner was as follows:

> "The said Thomas Lockhart, Charles Lockhart, Milton L. Porter, Robert Barta, Leo Pisney and Frank Pernicka on or about the 14th day of May, A. D. 1948, in the county aforesaid, did conspire or confederate together with the malicious intent wrongfully to injure the persons or property of Donald Eckhart, H. S. Clang, Flo Clang and Frank Struve."

Thereafter, the State proceeded to dismiss the charges against all the named defendants except petitioner, Thomas Lockhart. In this respect, the case was converted into the situation which would have existed if the original indictment had been altered so as not to name the other five. In that event, clearly a very material alteration would have been made in the indictment if the indictment were expressly so changed.

In sum, an indictment charging conspiracy among six defendants was first filed. Defendant however was sentenced as if under an indictment charging conspiracy by him alone.

This is not a situation where each defendant was charged with a separable offense and therefore had no stake in the naming of any others. Had the original indictment failed to allege the participation of at least one other person besides the petitioner, the indictment would have failed to set forth an indictable offense.

This is not a situation where the remaining five defendants were at large and unavailable for arrest and prosecution. They were arrested, were before the court, and were dismissed by official action of the state.

This is not a case in which only some defendants were dismissed, leaving at least two for purposes of the conspiracy charge; nor is it a case where the indictment charged participation in the conspiracy by others unknown to the grand jury. *All alleged participants were named, indicted and arrested, and all but petitioner were dismissed.*

This Court has but recently held that a defendant indicted on one charge may not be imprisoned on another and different charge not set forth in the indictment. *Cole* v. *Arkansas,* 333 U. S. 196. As this Court said in an earlier case, after setting forth the construction placed by the Supreme Court of the State on the indictment:

"We must take the indictment as thus construed.

> Conviction upon a charge not made would be sheer denial of due process." *DeJonge* v. *Oregon,* 299 U. S. 353, 362.

In the present case, had the state in the original indictment named only the petitioner as the sole alleged "conspirator" and no others, the indictment and any conviction under it would have been clearly objectionable. May the state then evade that consequence by indicting others along with petitioner and then proceed by its own action to dismiss as to all but petitioner? We submit that in so doing, the state itself acts *as if* only petitioner had been indicted and must accept the consequences of such action. In so doing, the state by its own action, in the light of the peculiar requisites of the conspiracy doctrine and statute, requiring participation of two or more persons in the offense, changed the character of the offense charged and sentenced petitioner for something which could not in the nature of things be the conspiracy charged in the indictment.

III.

Petitioner Was Denied Both Due Process of Law and Equal Protection of the Laws by the State's Arbitrary Selection of Him Alone for Sentencing While the Charges Were Dismissed Against All Other Alleged Co-Conspirators.

One of the basic cornerstones of the concept of due process of law is the requirement of uniform application without arbitrary discrimination. In an early decision of this Court the doctrine was stated thus:

> "And due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government. *Leeper* v. *Texas,* 139 U. S. 462."
>
> *Giozza* v. *Tiernan,* 148 U. S. 657.

And again, more fully stated:

> "By the Fourteenth Amendment the powers of the states in dealing with crime within their borders are not limited, but no state can deprive particular persons or classes of persons of equal and impartial justice under the law * * *. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Bank of Columbia* v. *Okely,* 4 Wheat. 235, 244. The power of the state must be exerted within the limits of those principles, and its exertion cannot be sustained when special, partial and arbitrary. *Hurtado* v. *California,* 110 U. S. 516, 535."
>
> *Caldwell* v. *Texas,* 137 U. S. 692.

Similar content has been given by this Court to the equal protection clause. In *Barbier* v. *Connolly,* 113 U. S. 27, this Court noted that the requirement of equal protection means that

> "* * * in the administration of criminal justice no different or higher punishment should be imposed upon one than is prescribed to all for like offenses."

A statute or ordinance may be completely non-discriminatory on its face, but if in administration, enforcement or application it is used to produce a discriminatory result, the equal protection of the law has been denied in violation of the Constitution. This was the doctrine long ago established in *Yick Wo* v. *Hopkins,* 118 U. S. 356. There, it will be recalled, the Court was confronted with a licensing ordinance ostensibly fair and impartial, but the Court was also confronted with evidence that the ordinance was administered to accomplish arbitrary discrimination. Said the Court:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and adminis-

> tered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

See also *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531.

In the light of these doctrines, the present case poses serious questions: Do the law enforcement authorities of a state have unrestricted power to select arbitrarily for sentence one individual among several defendants indicted jointly for a single offense of which the defendants can be guilty only in concert and not individually? Is there no restriction upon the power of the law enforcement authorities to select whom they will prosecute and as to whom they will dismiss? Particularly, do they have such power where the state elects to dismiss as to all but one defendant in a case where one defendant alone cannot by definition be guilty of the offense?

If petitioner was guilty of the offense charged against him then at least one of the remaining defendants must have been provably guilty along with him. When the state chooses to hold and imprison petitioner alone, the state exercises a power of arbitrary selection, in violation of the basic precepts of the court decisions quoted above.

IV.

If Petitioner Can Be Imprisoned Under the Statute and Indictment as Applied Here, Then the Statute and Indictment Were Too Indefinite and Uncertain to Conform to Due Process.

The doctrines underlying the due process requirement that a charge and the statute on which it is based be sufficiently definite and certain as to apprise the defendant of the nature of the conduct proscribed and of the offense alleged require no restatement here. *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *International Harvester Co.* v. *Kentucky*, 234 U. S. 616; *Waters Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 108.

In the present case the statute described an offense in which "two or more persons conspire or confederate together." The indictment charged an offense in which six named defendants (and no others) "did conspire or confederate together."

Both statute and indictment might under normal circumstances be deemed sufficiently definite and certain. But the validity of statute and indictment must be measured as interpreted and applied by the State Supreme Court.

As interpreted and applied here, the statute and indictment, despite reference to the act of "two or more persons" or of six named defendants, have been held to sustain the sentencing of only one person while charges are dismissed against all other alleged participants. We submit that a statute which describes an offense of "two or more persons" does not sufficiently apprise petitioner that he alone—and no others—may be guilty of the offense. We submit that an indictment which describes the offense of six named defendants alleged to have conspired or confederated "together" does not sufficiently apprise peti-

tioner that he alone may be guilty while the indictment is dismissed against all the others. If the decision of the State Supreme Court so interpreting and applying the statute does not offend the Constitution in other respects, then at very least it is a decision which exposes both statute and indictment as not having been drawn in language calculated properly to apprise the petitioner of the conduct prohibited and the offense charged.

Conclusion.

The State of Iowa chose to indict and condemn petitioner under the law of conspiracy. Petitioner thereupon became entitled under the Constitution to a fair, impartial, even-handed application of the law under which he was indicted. Whatever might have been the proper powers of the State to prosecute under other statutes, it could not, constitutionally, alter the law of conspiracy to make it an offense of a single person; it could not, constitutionally, alter the indictment to convert an offense which is necessarily joint into an offense of a single individual; it could not, constitutionally, make arbitrary selection of one defendant to be penalized for an offense which could not have been committed unless at least two defendants were guilty.

We respectfully submit that when it did these things, the State of Iowa deprived petitioner of due process of law and of the equal protection of the law.

The petition for certiorari should be granted.

Respectfully submitted,

EUGENE COTTON,
Counsel for Petitioner.

EDWARD J. DAHMS,
Of Counsel.

FILED
JUN 19 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1949

No. 844

LOEW'S INCORPORATED,
Appellant,

against

UNITED STATES OF AMERICA,
Appellee,

and

WARNER BROS. PICTURES, INC., *et al.*,
Defendants.

PETITION FOR REHEARING

JOHN W. DAVIS,
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IN THE

Supreme Court of the United States

October Term, 1949

No. 844

LOEW'S INCORPORATED,
against *Appellant,*
UNITED STATES OF AMERICA,
and *Appellee,*
WARNER BROS. PICTURES, INC., *et al.*,
Defendants.

PETITION FOR REHEARING

Petitioner, Loew's Incorporated, prays that this Court grant re-hearing of its order entered June 5, 1950, which affirmed on its own motion, without hearing or without briefs, a judgment of the District Court, and petitioner further prays that this Court grant opportunity for oral hearing and filing of briefs before disposing of this appeal.

Reasons for Granting Rehearing

This Court has summarily affirmed a judgment of the District Court which decreed that petitioner can no longer both produce and exhibit motion pictures, a business in which petitioner has been engaged for over 30 years.

The District Court entered the decree dissolving this long-standing enterprise purportedly in compliance with principles for the legality of vertical integration set forth in the opinion of this Court on a prior appeal (334 U. S. 131). Loew's does not question the soundness of these principles and it was not the purpose of this appeal nor is it the purpose of this application for rehearing so to do.

Moreover, petitioner fully recognizes the necessity of the Court's sifting frivolous from meritorious appeals and, more

particularly, of disposing summarily of many cases which are adequately governed by principles of law set forth in prior decisions of the Court. This case, however, stands on a wholly different footing.

The substance of the present appeal, apart from the important questions of law noted in petitioner's Jurisdictional Statement, is that the evidence, both before and after the remand, is wholly insufficient under the tests laid down by this Court, to warrant either the dissolution of this company or the perpetual prohibition against its engaging in production and exhibition of pictures, and, more particularly, that the new findings upon which the District Court purportedly based this far-reaching decree are utterly without support in the record as far as Loew's is concerned.

These matters presented on this appeal, going to the very heart of this serious litigation, were not and could not have been before this Court on the prior appeal. Indeed this Court was careful to point out when the case was sent back to the District Court:

> "What findings would be warranted after such an inquiry in the present cases, we do not know." (334 U. S. at 172)
>
> "These matters were not considered by the District Court. For that reason, as well as the others we have mentioned, the findings on monopoly and divestiture which we have discussed in this part of the opinion will be set aside. * * * it is necessary to set aside the findings on divestiture so that a new start on this phase of the cases may be made on their remand." (334 U. S. at 174)
>
> "* * * the District Court should be allowed to make an entirely fresh start on the whole of the problem." (334 U. S. at 175)

It is obvious from the foregoing that this Court did not send the case back merely for a ministerial act on the part of the District Court. On the contrary it directed a thorough consideration of the merits. As a consequence, Loew's sub-

mitted substantial and decisive new evidence demonstrating that its integration has not had, and cannot have, any exclusionary effect on competitors in the exhibition and distribution of motion pictures.

While the District Court has ruled against the petitioner in this regard, on these entirely new and all important points Loew's has had no appeal to this or any other Court. Moreover, under the Expediting Act the present appeal is Loew's only appellate remedy.

Where a decree such as this strikes down a business of making and showing pictures, jeopardizing the livelihoods and investments of thousands, this Court in good conscience should not dispose of the appeal on its own motion, without oral argument, without briefs or without adequate opportunity itself to examine this new record.

At this time the motion picture industry is in a recognized decline. The number of pictures which producers are permitted to release in foreign territories is severely restricted. The rental for the films can only be withdrawn from those territories on a very limited basis, thus greatly reducing the possible revenue for every picture and in turn limiting the amount available for new productions. Complete and permanent dissolution of Loew's as a producing-exhibiting unit, which has here been decreed, will definitely compel a material curtailment in making the superior quality motion pictures for which this company has become world-famous over the years.

The District Court's decision that Loew's must separate its production-distribution activity from exhibition was based for the most part upon its new findings after remand that "the theatre holdings of the major defendants have played a vital part in effecting violations of the Sherman Anti-Trust Act" and "were a means of carrying out the restraints and conspiracies" (New Finds. 43, a and 147, b).

These findings, which were made without any new evidence to support them, are directly contrary to the finding of fact after the first trial that "the illegalities and restraints

herein found are not in the ownership of" theatres by the producer-distributors, and "these practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five exhibitor-defendants and their subsidiaries have owned" theatres (Old Find. 154; underscoring added).

The District Court flatly admitted the absence of evidence in either the new or the old record to support its complete about-face, for in defense of its arbitrary action it said: "* * * this [earlier] finding was made because of our view that the competitive bidding system, when coupled with injunctions, would terminate the illegalities * * *" (District Court's Opinion After Remand; p. 31 of Jurisdictional Statement).

Surely rejection of future relief, i.e. compulsory competitive bidding (which this Court disapproved as an appropriate remedy) affords no ground for a new and directly contrary finding of "fact" as to past conditions. Yet, on no more substantial finding does this far-reaching decree of dissolution rest.

The foregoing, of course, is just an indication of the specious character of these new findings. An appraisal of pertinent facts in both the new and old record is required to fully appreciate the seriousness and extent of the error which has been committed by the District Court.

Loew's does not contest, nor does it appeal from, any of the provisions of the District Court's decree enjoining price-fixing, unreasonable clearances, joint ownership of theatres, pooling agreements, etc. The appeal is not on the ground that the District Court has abused its discretion in the manner in which it framed the decree.

The only question on this appeal is whether Loew's business of producing and exhibiting motion pictures, which it has done over the past 30 years, shall be permitted to continue. The District Court's unreversed findings of fact show that Loew's operates only 131 of the 18,076 theatres in the country. These Loew's operated theatres are located in 42

of the larger cities across the United States and represent but 1/10th of the theatres formerly operated by Paramount Pictures Inc. and less than 1/4th of the 640 theatres which the New Paramount Theatre Company is permitted to operate with the sanction of its Government consent decree; and these 131 Loew's Theatres compare with 501 Warner and 636 Fox.

Loew's has, and has had, absolutely no closed towns. In every place where Loew's operates there have been, and still are, other competing first-run theatres.

On the distribution side, the unreversed findings of fact show that in the 1943-1944 season Loew's distributed 33 films, or about 9% of the full-length feature films distributed in this country.

None of these figures approaches monopolistic proportions. It is inconceivable in the light of these facts that Loew's Incorporated, which has been operating as a vertically-integrated unit for these 30 years, should have to completely and forever separate its production from its exhibition business.

CONCLUSION

We respectfully submit that this Court should grant re-hearing of its summary order of June 5th and should afford opportunity for oral hearing and filing of briefs before disposing of this appeal.

Respectfully submitted,

JOHN W. DAVIS,
J. ROBERT RUBIN.

June 19th, 1950.

(OVER)

CERTIFICATE OF COUNSEL

We hereby certify that we are counsel for the petitioner herein and that the foregoing petition for re-hearing is in our opinion well founded in law and fact, is proper to be filed herein, and is presented in good faith and not for delay.

JOHN W. DAVIS

J. ROBERT RUBIN

End